TO THE

SUPREME COURT OF THE UNITED STATES

No. 76-210

JANE SPIVEY,

PETITIONER

vs.

STATE OF GEORGIA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE STATE OF GEORGIA

COOK & PALMOUR
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ATTORNEYS FOR PETITIONER

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JURISDICTIONAL STATEMENT

OPINIONS BELOW:

The opinion of the Georgia Court of Appeals affirming the conviction (No. 51778 dated March 18, 1976), its denial of motion for rehearing, and the denial by the Supreme Court of Georgia (not at this time officially reported) are set forth in the appendix.

JURISDICTION:

This petition for certiorari is from a decision of the Court of Appeals of Georgia in a criminal (felony) case, in which that court denied rehearing; and the Supreme Court of Georgia denied certiorari. Defendant complained of denial of her Sixth Amendment right to confrontation at the trial, in the Court of Appeals of Georgia, and in her application to the Supreme

Court of Georgia for the writ of certiorari (denied June 9, 1976).

Defendant consistently contended throughout the trial and appeals that she had been denied her Sixth Amendment right of confrontation; and that the Georgia court misapplied the Dutton decision.

The jurisdiction of this Court to review the Georgia appellate decisions here is authorized by the provisions of 28 USCA 1257(3), in that the right of confrontation by witnesses in a criminal trial is set up and claimed under the Sixth Amendment to the Constitution of the United States.

QUESTION PRESENTED:

Did the Georgia court err in applying the Dutton case (Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210) to reject defendant's contention that her Sixth Amendment right to confrontation had been denied?

The opinion of the Court of Appeals of Georgia was based upon several different propositions said to have been enunciated in Dutton:

(a) The lack of confrontation by the witness (Pack) was due to the State's negligence, but this was "harmless error."

(b) The statement of this absent witness (presented to the jury by a police officer) was of only "peripheral significance" and was neither "crucial" nor "devastating" because " ... (t)he State's case was not entirely dependent upon Pack's statement," and supporting factual details made it "highly unlikely" that cross-examination of Pack would have shown his statement unreli-

able. (Emphasis added).

Pack's statement (portions of which were related by the police officer from the transcript of a tape-recorded interview) had "indicia of reliability" because "voluntary," "spontaneous" and "against his (Pack's) penal interest."

(c) Dutton permits these "declarations" of co-conspirator Pack made against defendant "during the pendency of the criminal project," under Georgia Code, Sec. 38-306, "even where the alleged accomplice did not appear as a witness."

(All these quotations are from the opinion of the Georgia Court of Appeals).

STATEMENT OF THE CASE:

Jane Spivey was sentenced in a Georgia court on a jury verdict of burglary of her husband's mobile home located in Murray County, Georgia.

The burglars, and their roles, according to the State's evidence was this: (The "T-" and number refer to page of the transcript furnished the Georgia Court of Appeals):

Defendant Jane Spivey conspired with one Larry Pack to burglarize the home of her estranged husband. Pack engaged two men from Atlanta to burglarize the mobile home, who in carrying out the burglary picked up yet a third one. These men were Loggins, Gearin, and Shelton.

Loggins and Shelton had plead guilty to their part in the burglary; and were awaiting sentence when they testified at defendant's trial,

in which they implicated defendant Jane Spivey: They said that they met her at the home of Janie White (sister of Larry Pack), and that defendant Jane Spivey showed them where the trailer was located. Neither Pack nor Gearin testified, but Pack had given a tape-recorded statement to investigating officer McCumber, which the State had transcribed and parts of which McCumber related to the jury. (This testimony of McCumber is the focal point of defendant's contention of denial of confrontation right).

The State also introduced a statement the officers had taken from defendant herself, the phraseology of which implicated her in "the burglary."

Defendant's version is set in the same scenario, and with the same characters, but with a completely different plot! -

Defendant's husband had taken numerous valuable items from her (separate) home in adjacent Gordon County, which she suspected him of having given to the woman with whom he was living in this mobile home. Larry Pack volunteered to go with her and protect her in the event she went to this mobile home to see her husband about these things he had taken. Earlier in the day of the burglary Janie White called and told her that there were some boys at her (Mrs. White's) home who were looking for Larry Pack to collect a debt Pack owed them. Pack had again told defendant earlier that morning that he would go with her to the "trailer" (her husband's mobile home) to protect her from her husband (T-189); so she went over to Mrs. White's home in the event Pack should arrive (T-189).

While defendant and Janie White were talking about going to her husband's house trailer to

see if she could recover some of her things, the boys who had been looking for Pack volunteered to go along to protect her (T-189).

She and Janie White then drove to a point near the trailer, but when she saw that there was no one there, they drove away (T-190, T-205). She knew nothing of the burglary.

She never read the officer's resume of her statement to him, although she did sign it. Her signature was obtained while she was being detained to furnish bail (T-178-179). She pointed out in detail the errors in the written statement, which were basically the differences in the respective evidentiary versions of the State and that of herself (supra; also T-203-204). She gave an explanation of all of the State's damaging evidence; for instance, she explained her purchase of gasoline for the "boys from Atlanta" as a response to their complaint of lack of money and

that they were still looking for Larry Pack (T-190).

Against the background of these conflicting versions of the State and of defendant, we examine officer McCumber's testimony regarding Pack and his statement to McCumber, to evaluate its importance to defendant's claim of prejudice for lack of confrontation by Pack:

When Pack gave this statement he was under arrest for burglary of the home of defendant Jane Spivey, who had sworn the affidavit for the warrant for his arrest (T-112). Pack was "furious" with defendant because of this (T-116). McCumber tape-recorded and transcribed his interview with Pack including both Pack's confession to the burglary of defendant's home and to defendant's involvement in the burglary of her husband's house-trailer (T-98). Pack's statement was that defendant first asked that he kill

or cripple L. D. Spivey, which Pack declined (T-104); and failing in this, she offered him $100 to "rip off" defendant's husband's house-trailer, and also suggested her husband's TV shop as a fruitful source of burglary (T-103). Pack declined this, then she asked him to get someone to do it; to which he agreed (T-104). Pack contacted "two boys" in Atlanta. He knew the name of one of them as "Russell Garrett" but did not know the other (T-106-108). He told "Garrett" to call his sister, Janie White, in Resaca, so that "Garrett" could get in touch with defendant (T-107). (Janie White was also the sister-in-law of defendant, and they were acquainted). These boys had never done a "job" for Pack, but he knew of other jobs they had done (T-107).

Pack also told McCumber of an armed robbery in Sandy Springs, which information did not coordinate with the police records there (T-

119-120).

Through Murray County authorities, McCumber learned of a person named "Russell Gearin," (Pack's "Garrett") who was later charged as a participant in the burglary (T-108). McCumber also learned (independently of Pack) that Pack had an extensive record of convictions of larceny and counterfeiting totaling sentences of over 50 years (with shorter terms actually served - T-109, 110, 111); and that there were then outstanding Federal warrants for his arrest (T-109). On the Murray County charge (for theft of L. D. Spivey's house trailer) Pack was released upon his own recognizance (T-115).

Pack's burglary of defendant's home was supported by a statement obtained by McCumber from the son of Janie White (Pack's sister - T-116), who had apparently told defendant Jane Spivey that Pack had broken into her house (T-

117).

Officer Crisp of Murray County testified that Pack was released upon his own recognizance because "... without Larry Pack's help there would be no case, and ... I didn't know his past record at that time" (T-174). Pack could not be found to testify at the time of defendant's trial (T-170).

Defendant made timely objection to McCumber's testimony of what Pack had told him, invoking her Sixth Amendment right to confront the witness Pack (T-99, 100).

The trial court's overruling of this objection was enumerated as error to the Georgia Court of Appeals, which directly passed upon this constitutional question (see opinion in Appendix). Defendant's application to the Supreme Court of Georgia (which was denied) asked that court to review this constitutional point of law

decided by the Georgia Court of Appeals.

ARGUMENT:

DEFENDANT WAS DENIED HER SIXTH AMENDMENT RIGHT OF CONFRONTATION. THE GEORGIA COURT ERRED IN APPLYING DUTTON AS A PRECEDENT.

Dutton v. Evans (400 U.S. 74, 91 S.Ct. 210) recognized the continued viability of Pointer v. Texas (380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923); Douglas v. Alabama (380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934); Brookhart v. Janis (381 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314); Barber v. Page, (390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255); Roberts v. Russell, (392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100); and California v. Green (399 U.S. 149, 90 S.Ct. 1930).

The multiple bases of the Georgia Court's reliance on Dutton necessitates their analysis:

(a) Lack of confrontation due to State's negligence as "harmless error."

We do not find this specifically decided by Dutton. The concurring opinion of the Chief Justice and of Justice Blackmun gave as an "additional reason" for concurrence that the spontaneous utterance of Williams (given by Shaw's testimony) was "harmless error if it was error at all." (This did not involve negligence by the State in failing to have a witness present). The minority concurrence in Dutton held the error harmless, apparently because of the inconsequential nature of the Williams utterance, and because of the great weight of the State's evidence of defendant's guilt.

In the case here the denial of confrontation was complete, i.e., defendant had had no opportunity whatsoever to examine Pack (either on direct or cross-examination) at any time.

Compare Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (prior recorded testimony); and California v. Green, 399 U.S. 149, 90 S.Ct. 1930, at p. 1932 (prior opportunity to cross-examine).

The unqualified opinion of the Georgia court here that Pack's absence was due to the State's negligence makes inapplicable consideration of cases involving the witness' unavailability, such as those discussed in Mancusi v. Stubbs, 408 U.S. 204, 33 L.Ed.2d293, 92 S.Ct. 2308, at pp. 2311, 2312.

In Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, the statement of the absent witness was submitted through the transcript of his sworn testimony given at a preliminary hearing (88 S.Ct. at p. 1319). At the time of defendant's trial in a state court in Oklahoma, the witness was incarcerated 225 miles away in a Federal penitentiary

in Texas (88 S.Ct., at p. 1320). There, "(T)he sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence." (88 S.Ct., at p. 1322).

"While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case." (Id., 390 U.S. 725-726; 88 S.Ct. 1322).

This case also cites Motes v. U. S., 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900), which indicates that historically there was an exception to the confrontation requirement, where the witness was excusably unavailable and the accused had had an opportunity to examine the witness prior to the trial (20 S.Ct.

at pp. 998, 999).

The Georgia court here reaches its conclusion that the error was "harmless" because of the other factors upon which it based affirmance, such as the "peripheral" significance of Pack's statement, the weight of the evidence, the spontaniety and voluntariness of Pack's statement, and the Georgia statute which permitted statements of co-conspirators (Ga. Code, Sec. 38-306).

Under this logic, whether the error was "harmless" would depend upon the correctness of these other propositions upon which the Georgia court affirmed the conviction, which we discuss below.

Prima facie, under the above cases, defendant's confrontation right has been denied because she had no opportunity to examine the witness; and the absence of the witness was the

fault of the State.

(b) The Georgia court erred in finding fact-wise that Pack's statement was "voluntary" and "spontaneous"; was neither "crucial" nor "devastating"; that it was of only "peripheral" significance.

McCumber's resume of his conversation with Pack, which was that Pack stated that his conversation with defendant had "rocked on" for a couple of weeks (beginning with defendant's original suggestion of murder of defendant's husband and ending with their agreement that Pack would get someone to burglarize the home of her husband), contradicts the conclusion of the Georgia court that Pack's statement came within certain principles of Dutton:

Pack's statement to officer McCumber was not "spontaneous" within the Dutton meaning, because it was induced through extensive examination by McCumber, including questions and

answers, most of which were studied and calculated in nature. Pack at that time was under arrest for the burglary of defendant's home, and was in jail. It did not have Dutton's "indicia of reliability"; and was of more than "peripheral significance," because Pack had a reason for involving defendant in the burglary of her husband's home (Pack's own arrest at defendant's instance for burglary of her own home). Defendant denied that she conspired with Pack to burglarize her husband's home.

In Dutton, "(T)he circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime." (Dutton v. Evans, 400 U.S., at p. 89; 91 S.Ct., at p. 219).

The stage and the actors of the respective versions of defendant and of the State are

practically the same: The principal difference is in the dialogue between the actors - defendant says that her dialogue with Pack was only that he offered her protection from her husband in the event she went to recover articles her husband had stolen from her. Her dialogue with Loggins and Shelton was that (Pack not having appeared) they would accompany defendant and Janie White to the trailer and render the same service. Defendant says that, upon seeing that her husband was not at the trailer, she and Janie White drove on by. Again, there is only a difference in dialogue; Loggins and Shelton say that she showed them the trailer so that they could burglarize it, and admit that she did not go onto the premises. They do say that she waited for them and thereafter inspected the fruits of the burglary; but defendant denies all this.

McCumber's testimony of Pack's

statement to him was "crucial" and "devastating" to defendant: The burglary plan originated at defendant's suggestion. Only Pack and defendant were present. Defendant at first wanted Pack to murder her husband; but after the matter had "rocked on for a couple of weeks" the two agreed that Pack would get someone to burglarize his house trailer. She also suggested her husband's TV shop as a fruitful source of burglary. Pack contacted "two boys in Atlanta" to do the job. He gave one of them the telephone number of his sister (Janie White) in Resaca, Georgia; and told him to call, that "this woman" (he did not mention defendant's name) wanted to talk to him.

Loggins confirmed Pack's contact with him; and Shelton confirmed Loggins' testimony. Both basically confirmed Pack's version of his conspiracy with defendant to burglarize her husband's house-trailer, and that his TV shop

would also be a fruitful source of burglary. McCumber's testimony of Pack's statement places defendant and Pack at the center - rather than at the periphery - of the offense.

The State court interprets Dutton as approving lack of confrontation where "the State's case was not entirely dependent upon (the absent witness') statement" (emphasis added). Here, the over-riding evidence was held to be the testimony of the two co-defendants, plus "Mrs. Spivey's confession." (This same testimony was held to make McCumber's testimony "of peripheral significance at most," and to remove it from the category of "crucial" or "devastating" - which we have discussed above).

The Dutton majority pointed out that:-

"This case does not involve evidence in any sence 'crucial' or 'devastating' as did all the cases just discussed ... It does not involve

any suggestion of prosecutorial misconduct or even negligence, as did Pointer, Brookhart and Barber ...." (400 U.S., at p. 87; 91 S.Ct. 219, emphasis added; majority opinion by Mr. Justice Stewart).

"I am at a loss to understand how any normal jury, as we must assume this one to have been, could be led to believe, let along be influenced by this astonishing account by Shaw of his conversation with Williams in a normal voice through a closed hospital room door. I note, also, the Fifth Circuit's description of Shaw's testimony as 'somewhat incredible' and as possessing 'basic incredibility.'" (concurring opinion of Justice Blackmun and of the Chief Justice, 400 U.S., at p. 91; 91 S.Ct., at p. 221).

Considered from the standpoint of impact upon the jury, Pack's statement to Mc-

Cumber is clearly in a class different to that of Williams' statement to Shaw in the Dutton case, as clearly shown from the above evaluations by the Federal appellate courts of the nature of Williams' statement to Shaw.

(c) Defendant's Sixth Amendment right to confrontation was denied by application here of Sec. 38-306, Georgia Code.

Dutton had this same code section under consideration and held that "...(I)ts application in the circumstances of this case did not violate the Constitution ..." (400 U.S. 88, 91 S.Ct. 219 - emphasis added), pointing out that the statement there was neither "crucial" nor "devastating"; and that the State's case was supported by 19 other witnesses (Id.). The Dutton majority's opinion that "The Georgia statute can obviously have many applications consistent with the confrontation clause ..." (400 U.S., at p. 88, 91 S.Ct. 219), suggests a

reluctance to accept it in all cases.

Does Dutton mean that the statement of the absent witness must in each case be weighed or measured against the testimony of witnesses present at the trial; or does it mean that the rules of evidence under which such statements are made must remain under scrutiny for fairness, or does it mean a combination of the two?

Mr. Justice Rehnquist, writing for the majority in Mancusi v. Stubbs, 408 U.S. 204, 33 L.Ed.2d 293, 92 S.Ct. 2308 (408 U.S., at pp. 213, 214), said:

> "The focus of the Court's concern has been to insure that there are 'indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before a jury though there is no con-

> frontation of the declarant.' Dutton v. Evans, supra, at p. 89, 91 S.Ct. at 220, and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement,' California v. Green, supra, 399 U.S. at 161, 90 S.Ct. at 1936 ..."

Dutton also suggests the application or formulation of rules under which non-confronting statements may be submitted under the "indicia of reliability" theory, noting several rules already in existence (400 U.S. at p. 80, 91 S.Ct., at p. 215, Div. 3 of opinion).

Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, seems to furnish precedent for a rule applicable to the instant case; following the principle enunciated in Motes v. U.S., 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900):

In Barber, the State had not made

adequate effort to have the witness present. In disposing of the case, the Court "... remanded for further proceedings consistent with this opinion" (390 U.S., at p. 726, 88 S.Ct. 1322) which obviously meant that when the case went back for trial the State should make adequate effort to have the witness present.

In the instant case the Georgia court did not interpret Sec. 38-306, Ga. Code, as affording independent authority for introduction of a co-conspirator's statement. It said that "(T)he admission of McCumber's hearsay testimony (was) erroneous, since Pack's absence can be attributed directly to the mishandling of the investigating authorities ..." (emphasis added). We therefore have here basically the same State negligence as that in Barber.

We do not find in Barber, nor in any of the cases it cites (Motes v. U. S., supra;

Holman v. Washington (5 Cir. 1966) 364 F. 2d 618; Gov't. Virgin Is. v. Aquino (3d Cir. 1967) 378 F. 2d 540, any suggestion of a basis for decision such as that made here by the Georgia court; which is that the weight of the State's evidence is measured against its own negligence in failing to have the witness present, to determine whether or not the statement of the absent witness is "harmless error."

In Barber, denial of defendant's right of confrontation was held complete upon establishment of the fact that the witness might have been available, without more: "(W)e would reach the same result on the facts of this case had petitioner's counsel actually cross-examined Woods at the preliminary hearing. See Motes v. United States, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900)..." 390 U.S., at pp. 725-726; 88 S.Ct. 1322.

The Georgia court's decision is also inconsistent with the Mancusi interpretation (above) of Dutton; i.e., that the Court's concern is to "... insure ... 'indicia of reliability ...'"; and is inconsistent with California v. Green that it is to "... afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." (399 U.S., at 161, 90 S.Ct. at p. 1936).

"(W)e have more than once found a violation of confrontation values even though the statements in issue were admitted under a recognized hearsay exception." California v. Green, 399 U.S., at pp. 155-156; 90 S.Ct. 1934 (citing Barber and Pointer).

REASON FOR GRANT OF CERTIORARI:

(1) Dutton left uncertain the role of the WEIGHT OF EVIDENCE in considering claims of denial of confrontation; and the Georgia court has here interpreted Dutton to permit dispensing with confrontation when "(T)he State's case was not entirely dependent upon (the non-confronting) statement." The Georgia court gives WEIGHT OF EVIDENCE a dominant role in deciding the confrontation question.

(2) This Court should reconcile the "harmless error" and "indicia of reliability" tests emanating from separate concurring opinions which resulted in the Dutton majority. These two concepts are not consistent: If evidence has "indicia of reliability" it should not be "erroneous," albeit harmless. The Georgia court here has combined both concepts to reach its affirmance of the conviction: It found that,

although admission of McCumber's testimony was erroneous, it was "harmless based upon the predominant facts and logic by which Dutton was decided."

(3) The Georgia court overlooked crucial and substantial facts, (a) in concluding that the McCumber testimony was neither "crucial" nor "devastating," and that it was "of peripheral significance at most;" and that Pack's statement to McCumber was "spontaneous;" (b) It overlooked the fact that the only (two) "eye-witnesses" had pled guilty to the same offense but had not been sentenced when they testified; (c) It overlooked Pack's admitted animosity toward defendant and Pack's long criminal record, in evaluating "indicia of reliability" of his statement to McCumber.

CONCLUSION:

The foregoing demonstrates the importance to defendant of cross-examination of Pack from the standpoint of developing facts. The differences in the origin and nature of the statement of WILLIAMS (in Dutton) to that of PACK here demonstrate the absence here of the elements held in Dutton necessary to excuse lack of confrontation.

Respectfully,

COOK & PALMOUR

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CERTIFICATE OF SERVICE

I have served the foregoing application for writ of certiorari upon the State of Georgia by mailing a copy of it to the following officers of said State:

Hon. Samuel J. Brantley
District Attorney - Conasauga Circuit
Whitfield County Courthouse
Dalton, GA 30720

Hon. Arthur K. Bolton
Attorney General of Georgia
132 Judicial Building
Atlanta, GA 30334

This August 11, 1976.

A Cecil Palmour
Of Counsel for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF GEORGIA

JANE SPIVEY, Appellant

vs.

STATE OF GEORGIA, Appellee

(unofficially reported: 138 Ga. App. 298)

WEBB, Judge.

Jane Spivey was indicted for burglary, tried and convicted in the Superior Court of Murray County on June 18, 1975, and was sentenced to serve three years in the penitentiary. Her motion for new trial was overruled, and on appeal she enumerates two alleged errors, (1) that she was deprived of due process and a fair trial guaranteed by the Sixth and Fourteenth Amendments, and (2) the evidence did not establish her guilt beyond a reasonable doubt.

The state's brief was not filed until 36 days after the time for filing had expired. Our rules are equally applicable to district attorneys. "This court cannot demand per-

fect administration but does expect reasonable attention to the processing of cases, and particularly in the case of a criminal action fostered by the state against one of its citizens." *State v. Weeks,* 136 Ga. App. 637, 638 (222 SE2d 117). Here, however, we affirm the conviction and sentence.

Upon the trial the prosecution contended that Jane Spivey contacted an acquaintance, Larry Pack, to arrange the burglary of a mobile home belonging to her former husband L. D. Spivey. Two of the state's witnesses, Gary Loggins and Mike Shelton, were co-defendants who had previously pled guilty to the burglary. Gary Loggins testified that he was approached by Pack who told him "he knowed this woman that wants to rip this trailer off that belonged to her ex-husband, and said that she would pay us $500 to do it; and we could have all the stuff out of his trailer"; that at Pack's direction he and Mike Shelton and Russell Gearin drove to the Dalton area where they attempted to reach Pack by telephone; that they went to the home of Pack's sister, Janie White (Mrs. Spivey's sister-in-law), but Pack was not there; that Mrs. White called Mrs. Spivey who came to the house; and that Mrs. Spivey "told us about the trailer, that she wanted us to break into the trailer and steal the stuff, and she would pay us $500 to do it, and she mentioned something about shooting the man's legs off, and breaking into his TV shop and kidnapping him for two or three days."

Mike Shelton's testimony completely corroborated Loggins'. Both men also testified that Mrs. Spivey and Mrs. White led them to the trailer and waited at the intersection of the highway and the dirt road where the trailer was located until the burglary was completed. Subsequently they returned all the stolen items to the investigating officers.

Gearin and Pack did not testify. However, Edward McCumber of the Gordon County Sheriff's Department testified that he interviewed Pack while conducting an investigation of another burglary in Gordon County. At that time no one had been charged with or arrested for the burglary of the trailer of L. D. Spivey, nor had any of the stolen goods been recovered. The interview was recorded and transcribed and, over objection, was allowed in

evidence because Pack was unavailable to testify.

The state claimed that it made a diligent search for Pack prior to the trial. The evidence showed that Pack had been charged with the Spivey burglary and placed in the custody of the Murray County Sheriff's office, but released on an "own recognizance" bond before it was known that he had a criminal record of 28 arrests and 11 convictions. He was also on bond from Gordon County and a federal bench warrant for his arrest was outstanding. After the unsuccessful search of the county his name was placed on the "NCIC" network computer as wanted in Murray County.

The information volunteered by Pack to McCumber during the interview, as read to the jury by McCumber, was as follows: "At the conclusion of my talk with Larry Pack, my first statement was 'O.K., this is pretty well cleared up, you indicated that you have some information in reference to a burglary that happened out of this County, and you said you wanted to tell me about it because you felt it was an injustice what's going on here right now?' Pack said 'Yes sir, the same woman who has got a warrant for me paid two boys out of Atlanta to come up here and burglarize her ex-husband's trailer, and told them what they couldn't steal to tear up, and me and my wife is a witness on that, and my sister went with this woman out there, took the boys out there, and Jane and my sister Janie sat on a dirt road watching for the County Police, while these two boys burglarized the trailer, and they got a shotgun, a rifle, a pistol, a tape deck, a box full of tapes and two or three new sets of clothing that belonged to her husband. . . And he owns a TV shop in—what did I say the name was?' Then I said 'Chatsworth,' and he said, 'Yes, Chatsworth, he owns a TV shop up there.' Then I talked to him, I said, 'O.K. What you are saying in summary is that Jane Spivey and her husband are separated, is that right, and you mentioned to me before that she asked you to do her a favor, is that correct? 'Yes, sir.' 'What was the favor she wanted you to do? "She asked me if I could get someone to kill her husband,' and I told her I couldn't get nobody killed, but I would get somebody to shoot him, you know, to mess him up pretty bad, and she said she didn't want him messed

up, she wanted him dead, and I said 'Well'. . . . Q. Excuse me again for interrupting, but now who is the 'she' that Larry Pack keeps referring to? A. She is Jane Spivey. Q. O. K. Continue, please. A. And I said, 'Well, I can't get nobody to do that.' And so it rocked on a couple of weeks, and she asked me if—and she, Mrs. Spivey asked me if I could get someone to burglarize, well, she asked me to do it to start with, to go over there and burglarize the trailer and she'd give me $100.00. And I told her I didn't want to, and she said, 'Well, can you get someone to do it?' And so I called these two boys in Atlanta, they came up, they met Jane Spivey at my sister's house, Janie White, in Resaca, Georgia."

Agent W. E. Dodd of the Georgia Department of Investigation testified that Mrs. Spivey signed a waiver of rights form and confessed to her participation in the burglary. Officer McCumber, the Sheriff of Gordon County and a deputy testified that Mrs. Spivey's statement implicating herself was freely and voluntarily given in their presence and that she waived her right to remain silent or to have an attorney present. The statement and two waiver of rights forms signed by Mrs. Spivey were admitted in evidence.

Mrs. Spivey testified in her own behalf and repudiated her previous statement, asserting that Larry Pack had offered to protect her while she entered L. D. Spivey's trailer to retrieve some personal items Spivey had stolen from her, and that the break-in and burglary occurred without her knowledge. She also swore that she had repeatedly requested to have present an attorney who was representing her in other affairs before she was questioned.

The jury found Jane Spivey guilty of the burglary of the mobile home of L. D. Spivey. She contends that by allowing Officer McCumber to read Pack's statement when Pack was not present and did not testify, she was deprived of her right of confrontation and of cross examination of Larry Pack, and was denied a fair trial and due process of law. The essential question before us, then, is whether under the circumstances of this case Jane Spivey's burglary conviction must be set aside because of the admission of McCumber's testimony as to Pack's

statement. We conclude that the question has been answered in the negative by the Supreme Court of the United States in Dutton v. Evans, 400 U. S. 74 (91 SC 210, 27 LE2d 213) (1970).

Code § 38-306 provides that "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." In Dutton v. Evans, supra, the Supreme Court considered this provision and concluded that it met the constitutional requirements of the confrontation and due process clauses even where the alleged accomplice did not appear as a witness at the defendant's trial. However, the court laid down no ironclad validations, holding merely that "The Georgia statute can obviously have many applications consistent with the Confrontation Clause, and we conclude that its application *in the circumstances of this case* did not violate the Constitution." Id., pp. 87, 88. (Emphasis supplied.)

Although we view the admission of McCumber's hearsay testimony as erroneous since Pack's absence can be attributed directly to the mishandling by the investigating authorities, based upon the predominant facts and logic by which Dutton was decided, that error was harmless. That there may be harmless constitutional error where it does not adversely affect substantial rights of the defendant is well settled. *Cauley v. State,* 130 Ga. App. 278, 288 (203 SE2d 239) (U. S. cert. den. 419 U. S. 877) and cits.

Here the state's case was not entirely dependent upon Pack's statement. It presented two co-defendant eyewitnesses as well as Mrs. Spivey's confession and this evidence was clearly sufficient to sustain the conviction. Therefore, McCumber's testimony was "of peripheral significance at most" and did not constitute "crucial" or "devastating" evidence. Dutton, supra, pp. 86, 87.

It further appears that Pack divulged the information to the Gordon County Sheriff's office voluntarily while being questioned about an entirely different matter. Thus his statement was spontaneous and against his penal interest. These are "indicia of reliability" which the Supreme Court viewed as

"determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." Dutton, p. 89. Also, the interlocking factual details in the confessions of Loggins, Shelton, Mrs. Spivey and Pack make it highly unlikely that a cross examination of Pack could have shown the jury that his statement, though made, was unreliable. Id.; See also in this regard, Division 3 of *Gale v. State,* 138 Ga. App. 261.

While disapproving the use by the prosecution of Pack's statement with only the sketchiest showing of his unavailability in court, we agree with the principle first enunciated by Justice Cardozo[1] and quoted in part again in Dutton: "The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable man will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true . . . There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free." Dutton, pp. 89-90.

Judgment affirmed. Deen, P. J., concurs, Quillian, J., concurs in the judgment only.

ARGUED FEBRUARY 4, 1976 — DECIDED MARCH 18, 1976 — REHEARING DENIED APRIL 1, 1976 — CERT. APPLIED FOR.

Burglary. Murray Superior Court. Before Judge Vining.

Mitchell, Mitchell, Coppedge & Boyett, Neil Wester,

[1]Snyder v. Massachusetts, 291 U. S. 97, 122 (54 SC 330, 78 LE 674, 90 ALR 575).

Cook & Palmour, Bobby Lee Cook, Bobby Lee Cook, Jr., for appellant.

Samuel J. Brantley, District Attorney, for appellee.

APPENDIX B

COURT OF APPEALS
OF THE STATE OF GEORGIA
ATLANTA, April 1, 1976

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

51778. Jane Spivey v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS
OF THE STATE OF GEORGIA
CLERK'S OFFICE,
ATLANTA APR 1 1976

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Morgan Thomas CLERK

APPENDIX C

SUPREME COURT OF GEORGIA

ATLANTA, June 9, 1976

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Jane Spivey v. The State

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

Bill of Costs, $30
SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA July 2, 1976

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Cook & Palmour paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Joline B. Williams, Clerk.